Case No. 1492.

IN THE

United States Circuit Court of Appeals,

NINTH CIRCUIT.

SOUTHERN PACIFIC RAILROAD CO., ET AL.,
Defendants and Appellants,

vs.

UNITED STATES OF AMERICA,
Complainant and Appellee.

DEFENDANTS' REPLY BRIEF.

WM. SINGER, JR.,
Attorney for the Appellants.

WM. F. HERRIN,
Counsel for the Appellants.

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It must be borne in mind that the Company's *indemnity selection,* upon the validity of which the decision on this appeal depends, was made *six years after* the selected lands were restored to their former status as unappropriated public lands, by the Atlantic & Pacific forfeiture Act (*Tr.* 93, *Item* 37).

The argument of our "Defendants' Brief" is based upon the two contentions that (1st) on principle, the rule in the Ryan case (99 U. S. 382), and the unbroken

line of Supreme Court decisions following the Ryan case ruling, it is settled law that the validity of indemnity selection under railroad land-grants *depends on the status of the selected land at date of selection,* irrespective of its status at some former time; and that (**2nd**) the rule in the Ryan case has never been modified or reversed, *nor do any of the decisions introduced in evidence or relied on by counsel for complainant hold against the validity of this indemnity selection* at bar or any similar selection.

1st. We observe nothing in "Complainant's Brief", under reply, tending to contradict, or discredit, our above-mentioned **"1st"** contention, except in so far as (if at all) the attempted controversion of our above-mentioned **"2nd"** contention has such tendency; and so beg leave to re-call this Court's consideration to subdivision "I", pages 4 to 10, inclusive, of our "Defendants' Brief" on file herein.

2nd. Subdivision "II", pages 11 to 14, of our "Defendants' Brief", fully answers "Complainant's Brief", under reply, except in so far as it is therein said (pp. 6, 7) that the Supreme Court decision reported in 200 U. S. 341 was as to "lands situated precisely as are the lands in the present suit."

To the same erroneous statement made by the "Brief for United States" on the Circuit Court hearing of this case, the writer of this (Mr. Singer) made the following reply on pages 10 and 11 of "Defendants' Brief" on final hearing of this case in the Circuit Court; which reply is now repeated here:

"Throughout the above-mentioned Brief, counsel refers to the Supreme Court decision (200 U. S. 341) of suit No. 878 (this Court) as conclusive against the defendant Southern Pacific in this case; and on the last page of his Brief in this case counsel says that '200 U. S. 341 involved lands situated precisely as the lands in the present suit'.

In this counsel is mistaken. Suit No. 878 (200 U. S. 341) did not involve any land, not one tract of land, *within indemnity limits* of the Southern Pacific Railroad Company's Branch-line grant; as the writer of this stands ready, and offers, to show.

The decree of this Court in No. 878 embraced six tracts of land within indemnity limits of the defendant Railroad Company's Main-line grant; but, in fact, and as found by this Court in the first paragraph of 'Subdivision IV' of its decree in that case (No. 878), those six tracts are

'*within the primary or granted limits* of the grant made unto the said Southern Pacific Railroad Company by the said Act of Congress of March 3d, 1871; * * the said lands *were erroneously patented* unto the defendant Southern Pacific Railroad Company as enuring to it *under said grant of March 3d*, 1871.'

Counsel for the United States, in his 'Brief for United States', in the Court of Appeals (C. C. A. No. 956) of case No. 878, speaking of those six tracts, said (pp. 66, 67):

'It has been before mentioned in this Brief that the six tracts of land which are mentioned in Subdivision IV of the decree (record 244, 246) are situated within the indemnity limits of the grant made to the Southern Pacific Railroad Company by section 18 of the Act of Congress of July 27, 1866, and are also in the place limits of the Atlantic & Pacific grant, but were patented to the Southern Pacific as part of its grant of 1871 * *.

If those particular patents are void, it is not important whether or not the Southern Pacific might have selected those lands and might have secured

an approval of such selections under another grant, *because they were not so selected,* nor was any such selection ever approved.'

From which it clearly appears that the decision in 200 U. S. 241 did not decide, and could not have decided, any question as to *indemnity rights* of the defendant Railroad Company; nor does the decision disclose that such question was in the Court's mind.

Suit No. 878, however, did include lands of the forfeited Atlantic & Pacific grant within indemnity limits of the Southern Pacific Main-line grant; *but the decree dismissed complainant's bill as to those lands* (Sub. V)—*and there was no appeal.*''

Beyond this we beg leave to re-call the Court's attention to our ''Defendants' Brief'', on file herein; and to ask, most respectfully, that the decree appealed from be reversed.

WM. SINGER, JR.,
Attorney for Appellants.

WM. F. HERRIN,
Counsel for Appellants.